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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 395

THE HONORABLE JAMES M. CARTER, Judge of the United States District Court of the Southern District of California, Southern Division, et al.,
Petitioner,

vs.

OLYMPIC REFINING COMPANY, a corporation, and the UNITED STATES OF AMERICA,
Respondents.

BRIEF OF RESPONDENT OLYMPIC REFINING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE.

Respondent, Olympic Refining Co. (hereinafter Olympic) is a corporation which had been engaged in

the business of refining and marketing petroleum products in the States of California, Oregon and Washington. On February 28, 1958, Olympic filed a complaint in the United States District Court for the Northern District of California, Southern Division (San Francisco), against Standard Oil Company of California (hereinafter Standard), and General Petroleum Corporation (hereinafter General), charging those defendants with violations of the antitrust laws. Jurisdiction in that case was based upon Section 4 of the Clayton Act (15 U.S.C. 15).

Olympic's complaint asserted that the named defendants, acting jointly with specifically named co-conspirators[1] had engaged in a combination and conspiracy to restrain trade in and monopolize the production, refining, transportation and marketing of crude oil and refined petroleum products in five Western states.

On May 12, 1950, the United States filed a civil complaint in the United States District Court for the Southern District of California, Central Division (Los Angeles), against Standard, General, Shell Oil Co., Inc., Union Oil Company of California, Tidewater Associated Oil Company, The Texas Company, Richfield Oil Corporation and the Conservation Committee of California Oil Producers, charging those defendants with having engaged in a combination and conspiracy to restrain trade in and monopolize the

[1]The named co-conspirators are: Shell Oil Co., Inc., The Texas Company, Richfield Oil Corporation, Tidewater Associated Oil Company, Union Oil Company of California and the Conservation Committee of California Oil Producers.

production, refining, transportation and marketing of petroleum products in the States of California, Washington, Oregon, Nevada and Arizona. On August 24, 1956, the Government filed an amended complaint in that action.

The combination and conspiracy alleged by Olympic in its case against Standard and General, is almost verbatim the same combination and conspiracy alleged by the Government in the amended complaint in its equity suit (hereinafter referred to as the Government case).[2] Olympic alleged that it was injured by acts done pursuant to and in furtherance of the alleged illegal conduct charged in the Government case.[3]

During the discovery stages of the Government case, the defendants severally propounded voluminous interrogatories to the Government seeking to elicit the facts upon which the Government would rely to establish its claim for relief. The Government prepared answers and amended and supplemental answers to these interrogatories, which included a document designated as "Description of Documentary Material and Oral Testimony", a list of witnesses the Government proposed to call at trial and summaries

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[2]The Court below noted in Fn. 2 at 332 F. 2d at p. 262 that "The combination and conspiracy alleged by Olympic in the Olympic case is virtually identical with the combination and conspiracy alleged by the Government in the Government case. While only Standard and General were named defendants in the Olympic case, all of the other oil companies which were defendants in the Government case were named as co-conspirators."

[3]The Court of Appeals concluded that Olympic's antitrust action was "based on the same alleged violations" as the Government case. 332 F. 2d at p. 265.

of the anticipated testimony of these witnesses. These documents will be referred to hereinafter as the Government Answers. All of these documents were filed by the Government in the District Court and could have been examined by Olympic were it not for the existence of certain protective orders which required the Clerk of the District Court to keep those documents under seal.

The first of these orders was entered on September 6, 1955, pursuant to a stipulation between the Government and the defendants in the Government case. It provided, in effect, that neither the plaintiff nor the defendants would file any of their respective answers to interrogatories without giving fifteen days' prior notice and that, until filed, such answers would be held in confidence.

The second order, dated December 17, 1956, was entered over the objection of the Government in response to the defendants' motion, under Rule 30(b), Federal Rules of Civil Procedure, made after the Government gave notice pursuant to the order of September 6, 1955 that it intended to file its answers to defendants' interrogatories. This order requires that the filed Government Answers, "and all other documents and papers related thereto, including the document designated 'Description of Documentary Material and Oral Testimony', lists of witnesses, and statements of witnesses . . ." be retained by the Clerk as though under seal.

The third protective order, dated June 19, 1959, was one of the two provisions of an order granting the

Government's motion that the defendants in the Government case make prompt delivery to the Government of the original copies of their answers to the interrogatories. This provision of the order reads:

> "It is Further Ordered that plaintiff shall not publicly disclose said answers to interrogatories except during the course of trial of this case or upon further order of this Court."

On November 20, 1959, Olympic filed a motion for the production of documents pursuant to the provisions of Rule 34 of the Federal Rules of Civil Procedure in its case pending in the District Court in San Francisco. This motion sought, *inter alia,* the Government's answers and defendants' answers to Government interrogatories in the Government case.

On March 9, 1960, the Honorable Albert C. Wollenberg, Judge of the District Court for the Northern District of California, Southern Division, without written opinion and without prejudice, denied Olympic's motion insofar as it sought production of either the Government's Answers or defendants' answers to government interrogatories (Petition for Writ of Mandamus, pp. 6-7).

On May 16, 1962, at a pre-trial conference before the Honorable Lloyd Burke, Judge of the District Court for the Northern District of California, Southern Division, respondent renewed its motion for production of the Government's Answers and defendants' answers to Government interrogatories. Judge Burke, without entering a formal order, commented "I will read the material that is in the file but right now my

initial reaction, if you want the material, go down and get it from Judge Carter". (Petition for Writ of Mandamus, p. 7).

On May 29, 1963, respondent filed notice in its case in the District Court in San Francisco that, on a specified date, it would take the pre-trial deposition of Stanley E. Disney, Chief of the Los Angeles Office of the Antitrust Division. On June 3, 1963, the Clerk of the District Court for the Southern District of California, acting upon the request of respondent Olympic, made pursuant to Rule 45(d) of the Federal Rules of Civil Procedure, issued a subpoena duces tecum to Mr. Disney requiring him to produce certain described documents at the deposition hearing. The documents sought by this deposition were copies of the Government Answers filed in the Government case.

In lieu of responding to the subpoena duces tecum directed to Mr. Disney, the Government, on August 15, 1963, filed a motion in the Government case to vacate the three protective orders. Olympic intervened, without objection, in support of the Government motion. The motion was opposed by all of the defendants in the Government case.

On November 12, 1963, the District Court entered an order based upon findings of fact and conclusions of law, denying the motion to vacate the protective orders and quashing the subpoena duces tecum directed to Mr. Disney.

On November 21, 1963, respondent filed its application for leave to file a petition for a writ of mandamus directed to Judge Carter. The petition sought

an order directing Judge Carter to vacate the three protective orders or, in the alternative, to vacate the order of November 12, 1963 insofar as that order quashed the subpoena duces tecum. The Court of Appeals for the Ninth Circuit granted the motion for leave to file the petition and granted all parties in both the Olympic and Government Cases leave to intervene in the mandamus proceeding. The Government intervened in support of Olympic's petition for a writ of mandamus; all defendants in the Government case intervened in opposition thereto.

On May 19, 1964, the Court of Appeals issued its order reversing the order of November 12, 1964 and remanding the case to the District Court "for entry of an order modifying the protective orders in such manner that Olympic may have access to the documents in question for use in the Olympic case, subject to such reasonable restriction as may be necessary and practicable to prevent unnecessary disclosure of any present trade secrets or presently sensitive competitive information that may be contained in such documents". 332 F.2d at p. 266.

The present petition for writ of certiorari seeks to have this Court set aside that order of the Court of Appeals.

REASONS FOR REFUSING THE WRIT

SUMMARY OF ARGUMENT

Petitioners' contention that the Court of Appeals had no jurisdiction to review Judge Carter's Order of November 12, 1963 because the Expediting Act (15

U.S.C. 29) vested exclusive jurisdiction in this Court, is wrong for two reasons. First, it ignores the fact that Judge Carter's order quashed a subpoena duces tecum issued in the purely private litigation between Olympic, Standard and General. Such an order which vitally affects litigation over which the Court of Appeals unquestionably has appellate jurisdiction may be reviewed by mandamus in aid of that appellate jurisdiction under 28 U.S.C. 1651(a).[4] *United States v. Mayer*, 235 U.S. 555 (1914); *Roche v. Evaporated Milk Assn.*, 319 U.S. 21 (1943). See also *American Concrete Agricultural Pipe Assn. v. No-Joint Concrete Pipe Co. and the Honorable Harry C. Westover*, 331 F.2d 706 (9th Cir., 1964).[5]

In asserting that this Court had exclusive jurisdiction to review the order of November 12, 1963, petitioners treat the order as a "final judgment" in a "civil action . . . wherein the United States is complainant".[6] Plainly this is not such a case. For the

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[4]1651(a) provides that: "The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[5]In this case decided on April 27, 1964 (rehearing denied June 1, 1964) the Ninth Circuit said: "Under 28 U.S.C. 1651(a), this court may issue a writ of mandamus necessary or appropriate in aid of our appellate jurisdiction and agreeable to the principles and usages of law." 331 F. 2d at p. 709. In denying the issuance of a writ in that case, the Court however clearly stated that it had the "power to review by mandamus" an order of the District Court which was neither final nor appealable. 332 F. 2d at p. 709.

[6]The Expediting Act (15 U.S.C. 29) provides:

"In every civil action brought in any district court of the United States under any of said (Antitrust) Acts, wherein the United States is complainant, on appeal from the final judgment of the district court will lie only to the Supreme Court."

controversy below plainly was, and is, "entirely between private parties and is outside the main stream of the litigation in which the Government is directly concerned". *Shenandoah Valley Broadcasting v. A.S.C.A.P.*, 84 S.Ct. 8, 9 (1963).

Petitioners' second question is compound. In seeking review of whether or not the District Court had discretionary power to "enter and continue in effect" the protective orders, petitioners ignore the distinction between (a) the validity of the sealing orders when made and (b) the power of the District Court to enforce them against a litigant in a related case. But, the Court of Appeals noted ". . . we do not regard the question of whether the protective orders were valid when entered as properly before us". 332 F.2d at p. 264. Nor did the Court of Appeals have occasion to determine that the protective orders were not still valid as against the public at large. All that the Court of Appeals decided was that the District Court should have modified those orders so that Olympic, "a litigant in another antitrust action based on the same alleged violations", may have access to the documents for use in its litigation. And even that order was subject to the District Court's imposition on Olympic of "such reasonable restriction(s) as may be necessary and practicable to prevent unnecessary disclosure of any present trade secrets or presently sensitive competitive information that may be contained in such documents". 332 F.2d at p. 266.

In deciding that Judge Carter had no power to *enforce the protective orders* against Olympic, the

Court of Appeals applied the principle laid down by this Court in *Ex Parte Uppercu*, 239 U.S. 435 (1915).

Thus, there are no grounds warranting further review of any matter in this case by this Court. The petition for writ of certiorari should be denied.

ARGUMENT

Petitioners' first question asks:

> "Did the Court of Appeals have jurisdiction to review the order of the District Court in view of the provisions of the Expediting Act (c. 544, 32 Stat. 823; 15 U.S.C. 29) conferring exclusive jurisdiction on this Court in civil antitrust cases brought by the United States?"

We think it clear that the Court of Appeals had jurisdiction. Petitioners' argument is a classical bootstrap. By characterizing the present controversy as a final chapter in *United States v. Standard Oil Co. of California* (S.D. Cal. Civil 11584-C) (the Government case), and concluding that the issue involved in the Court below was "essentially between the Government and the defendants" in the Government case, petitioners ignore the reality of what transpired below.

Olympic, which had already twice attempted unsuccessfully to secure the sealed documents by discovery in its case pending in the District Court in San Francisco, and which had been judicially admonished to get the documents from Judge Carter, issued a subpoena duces tecum to Mr. Disney calling for the

Government Answers. The Court of Appeals recognized that the motions made by the Government to vacate the protective orders were no more than a reaction to that subpoena. The Court said: "Faced with the subpoena duces tecum directed to Disney, the Government, on August 15, 1963, filed a motion in the Government case to vacate the three protective orders . . . ." 332 F.2d at page 262. And Judge Carter also recognized that his ruling on the motion to vacate the protective orders necessarily affected and constituted a dispositive ruling on the subpoena issued in the Olympic litigation. He said:

> "I think I should also quash that subpoena. Mr. Blecher was very fair in pointing out that that is really an issue. I think I should quash the subpoena and *terminate any further proceedings on that score.*" (Appendix B, page vi, Petitioners' Brief.) (Emphasis added)

And the Order as to which the writ of mandamus was taken provided that:

> "Compliance with the subpoena addressed to the Government by Olympic Refining Company would be contrary to the terms of the three protective orders issued by the Court. The subpoena therefore should be quashed." (Appendix B, page xii, Petitioners' Brief.)

At all times it was apparent that the status of the subpoena duces tecum directed to Mr. Disney was, in fact, the ultimate matter for determination, and that the efficacy of the subpoena depended upon the enforceability of the protective orders. Thus, the Court of Appeals said:

> "While there was no formal motion to quash the subpoena duces tecum, the propriety of that subpoena was necessarily drawn into question by the motion to vacate the protective orders. Accordingly, during the district court argument on the Government motion to vacate, all parties proceeded on the assumption that the court could make any order with reference to the subpoena which would be appropriate *in view of the disposition of the motion to vacate.*" 332 F.2d at page 262. (Emphasis added)

Viewing the sequence of events here in context, two things are evident: (1) the subpoena duces tecum issued *in the Olympic litigation* precipitated the entire proceeding before Judge Carter and (2) while Judge Carter's Order of November 12, 1963 had no significance whatsoever in the Government case long since concluded, it did finally and dispositively preclude Olympic, in its litigation, from access to the sealed documents.

Notwithstanding the procedural manipulation through which the issue was presented, the Court of Appeals recognized that Judge Carter's ruling was final on the question of whether Olympic could get the documents. Accordingly, the Court of Appeals exercised its discretionary power to issue mandamus in aid of its ultimate appellate jurisdiction in the *Olympic* case. See *American Concrete Agricultural Pipe Assn. v. No-Joint Concrete Pipe Co. and the Honorable Harry C. Westover,* 331 F.2d 706 (9th Cir. 1964).

The jurisdiction of the Court of Appeals to issue mandamus in aid of its appellate jurisdiction is not

affected by the Expediting Act. This Court has recently held that the Expediting Act is not applicable where the "controversy which is disposed of by the District Court's order is entirely between private parties and is outside the main stream of the litigation in which the Government is directly concerned". *Shenandoah Valley Broadcasting v. A.S.C.A.P.*, 84 S.Ct. 8, 9 (1963).

In that case, the District Court for the Southern District of New York in 1950, entered an amended consent decree in a government Sherman Act suit requiring ASCAP, *inter alia*, to "grant to any user making application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" subject to a reasonable license fee. On request of petitioners for a license, ASCAP refused to fix a fee and, as provided by the amended consent decree, an application was filed for an order to fix a reasonable fee. The District Court found that the consent decree did not require ASCAP to issue the type of license petitioners requested and, therefore, dismissed the application. The petitioners took an appeal to the Court of Appeals and also perfected a direct appeal to this Court under the Expediting Act (15 U.S.C. 29). This Court dismissed the appeal for want of jurisdiction. 371 U.S. 540 (1963). Thereafter, the Court of Appeals dismissed the appeal taken there on the ground that all appeals must be routed to this Court by reason of the Expediting Act.

This Court, in holding that the Court of Appeals had jurisdiction of the appeal, pointed out that "di-

rect appeals to this Court are authorized by that Act only from final judgments where the United States is a complainant. The purpose of the Act is to expedite litigation of 'great and general importance' where the Government is the aggrieved party." 84 S.Ct. at page 9.

Petitioners' assertion that *Shenandoah* is not applicable is based entirely on the unsupported assertion that the "issue involved here is essentially between the Government and defendants" in the Government case. But, indeed, had the petitioners themselves moved to quash the subpoena issued to Mr. Disney instead of waiting for and attempting to influence the Government's response thereto, it is probable that the Government would never have become involved here at all. And this is clearly what the Court of Appeals found to be the case. It said:

> "In our opinion, the order of November 12, 1963, is of an ancillary character as so defined, and is therefore subject to review in this court. That order, dealing with the question of whether protective orders entered years ago in a Government antitrust suit which was terminated in 1961, disposes of a controversy outside of the main stream of the litigation in the Government case. It is essentially a controversy between private parties in which the Government is not directly concerned, for although the Government made the motion to vacate the protective orders, it did so in aid of Olympic's effort to obtain access to documents which the oil companies do not wish to have released." 332 F.2d at page 263.

The cases cited by petitioners have no application here. Both *Terminal Railroad Assn. v. United States,* 266 U.S. 17 (1924) and *United States v. California Canneries,* 279 U.S. 553 (1929), involved situations where the appellate review involved "a final judgment ... wherein the United States is complainant". In both cases, the scope and application of the *final judgment* was the pivotal issue. But here, the issue did not concern itself in any way with the final judgment in the Government case. The issue below was whether or not certain protective orders entered in the course of discovery proceedings in the Government case could be enforced as a bar to compliance with a subpoena issued in purely private litigation. As the Court of Appeals found, the conflict was "outside of the main stream of the litigation in the Government case" and, as in the *Shenandoah* case, was 'ancillary' to the Government litigation. Accordingly, the first question presented by petitioner raises no issue which was not carefully considered and correctly decided by the Court below.

Petitioners' second question asks:

"Did the District Court have discretionary power to enter and continue in effect in a Government civil antitrust case protective orders which deny access by the public generally, and by a private antitrust plaintiff specifically, to pretrial documents filed by the Government?"

The question misstates the issue raised and decided below. The Court of Appeals specifically stated that it did "not regard the question of whether the pro-

tective orders were valid when entered as properly before us" 332 F. 2d at p. 264. Nor did its remand to the District Court require the entry of an order vacating the protective orders as to the public at large. Finally, even the order which the Court of Appeals directed Judge Carter to enter permits Olympic to have access to the documents subject to a further protective order if there should be contained in the documents any presently sensitive competitive information or trade secrets.

The narrow question presented to and decided by the Court of Appeals was whether or not Judge Carter had, under the circumstances of this case, power to *enforce* his protective orders against Olympic, which in its private litigation had caused to be issued a subpoena calling for documents subject to those protective orders. The Court of Appeals correctly decided that he did not. It did so in reliance upon the precedent established by this Court in *Ex parte Uppercu*, 239 U.S. 435 (1915) in which Mrs. Justice Holmes, speaking for this Court, said that similar sealing orders against a similar petitioner had "no judicial character" but were "simply an unauthorized exclusion of him by virtue of *de facto* power". 239 U.S. at p. 441.

What was really in issue before the courts below was whether petitioners were entitled to derive an advantage in private litigation by reason of the protective orders entered in the Government case. Having been charged by the Government with participation in a sweeping combination and conspiracy to restrain trade in and monopolize the oil industry in the Pacific Coast states, petitioners directed volu-

minous interrogatories to the Government to ferret out the facts on which it would rely to establish its claim for relief. Having received what they asked for, petitioners convinced the district judge that this collocation of evidence should be sealed from public scrutiny and more particularly from the eyes of any potential treble damage litigant.

Without respect to propriety of such orders when entered there is nothing, express or implied, in any Act of Congress, in any Rule of the Federal Rules of Civil Procedure, or any pronouncement of this Court which authorizes a district court judge to seal in perpetuity as against a litigant whose complaint is based upon the same alleged violations documents filed and used in a Government antitrust case.

Petitioners' argument that the ruling of the Court below prevents a district judge from entering an effective protective order in any Government antitrust case is devoid of any merit. For even here the protective order is still effective as against the public at large. Indeed, the only person in the world now entitled to review these documents is Olympic Refining Company and its counsel, and even they may be subjected, if necessary, to certain restrictions on the disclosure of the data contained in the documents.

Nor is there merit in the contention that the Publicity in Taking Evidence Act, 15 U.S.C. 30 (which the Court of Appeals used to buttress its conclusion) conflicts with the Federal Rules of Civil Procedure which permit the entry of protective orders under designated circumstances. For as we have already

pointed out the Court below did not decide that the orders were not valid when entered, or that protective orders could not be entered at all. All that the Court of Appeals decided was that the orders could not be *enforced* as a bar to compliance with a subpoena issued in purely private litigation, and it did so in reliance upon *Ex parte Uppercu*, supra. Specifically citing *Uppercu*, the Court concluded that nothing in the Federal Rules of Civil Procedure or any other statute permitted a protective order to be *enforced*, subject to further protection, against a private litigant where relevancy is shown. Thus no question of conflicting statutes or repeal by implication is involved here.

Finally, the arguments advanced by petitioners that the procedure followed by Judge Carter is in the public interest in promoting expeditious disposition of antitrust litigation is plainly wrong.

While it may be true that the disposition of Government antitrust cases by consent decree serves the public interest, it is also true that private treble-damage actions are an important component of the public interest in "vigilant enforcement of the antitrust laws." *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 329 (1955). But in encouraging consent settlements in Government litigation (Section 5, Clayton Act, 15 U.S.C. 16) nowhere did Congress, even by implication, grant a license to district judges to suppress the evidence elicited during discovery—particularly where the evidence was specifically sought by the defendant. Indeed, it is almost sham to characterize the disposition of the Government case as a "consent decree". Only after nearly 10 years of dis-

covery which produced literally thousands of pages of interrogatories and responses, and which consumed nearly 100 man years of Government time and expense, and then only after a *pre-trial* ruling that the district judge would not grant the Government the relief it sought was there a disposition of the litigation. This is not the quick capitulation Congress envisioned. Cf. *City of Burbank v. General Electric Co.*, 329 F.2d 825, at p. 835 (9th Cir., 1964). And to prevent the use of evidence elicited during discovery in such a case serves *no* purpose other than to thwart treble-damage actions and their effect on the enforcement of the antitrust laws.

The carefully considered opinion of the Court of Appeals reached the correct conclusion. There is no need for this Court to reexamine that result.

CONCLUSION

For the reasons stated herein, neither of the questions posed by petitioners merit consideration by this Court, and respondent Olympic Refining Company respectfully urges that the petition be denied in its entirety.

Dated, San Francisco, California,
August 26, 1964.

Respectfully submitted,

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